

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHNNY WEISER)	
Claimant)	
VS.)	
)	Docket No. 1,008,667
GEORGE SHAW CONSTRUCTION COMPANY)	
Respondent)	
AND)	
)	
BUILDERS' ASSOCIATION)	
SELF-INSURERS' FUND)	
Insurance Fund)	

ORDER

Claimant appealed the August 27, 2003 Preliminary Decision (Decision) entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

This is a claim for a left knee injury that allegedly occurred in October 2002, while claimant was working for respondent in Paola, Kansas. Claimant also contends that he further aggravated his left knee each working day through his last day of employment with respondent on or about January 13, 2003.

In the August 27, 2003 Decision, Judge Foerschler denied claimant's request for workers compensation benefits. The Judge stated, in part:

While it is possible that Claimant was injured at work as he relates, notice of the injury appears only to have been communicated to co-workers and possibly to a supervisor who was not over the Claimant. No benefits can be ordered without better proof of compensability. . . .

Claimant contends Judge Foerschler erred. Claimant alleges he injured his left knee while working for respondent when his left leg became mired in mud and it popped. Claimant also contends he gave respondent timely notice of the accident when he allegedly told his foreman the same day that the work site needed to be cleaned up before somebody else got hurt like him. Accordingly, claimant requests this Board to reverse the

August 27, 2003 Decision and find that he is entitled to receive workers compensation benefits for his left knee injury.

Conversely, respondent and its insurance fund contend claimant has failed to prove that he injured his left knee while working for respondent and that claimant has also failed to prove he provided respondent with timely notice of the alleged work-related injury. Accordingly, respondent and its insurance fund request the Board to affirm the August 27, 2003 Decision.

The only issues before the Board on this appeal are:

1. Did claimant injure his left knee in an accident that arose out of and in the course of employment with respondent?
2. If so, did claimant provide respondent with timely notice of that accident or injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

Claimant testified his left knee popped on an unknown date shortly before October 15, 2002, when he was working in a muddy hole. Claimant also testified that on the same day he mentioned to his supervisor, Kenneth Pittman, he was injured:

Q. (Mr. Snider) Did you tell anybody about this [left knee] incident?

A. (Claimant) At noon that day, I was -- was when I had my dinner, and I told Kenny Pittman, he was the foreman, I told Kenny, I said, you need to get this job cleaned up before somebody else gets hurt like I did.

Q. What was Mr. Pittman's response?

A. Yeah, sure.

Q. Did he say it as though he were intending to correct problems or what tone did he use with you?

A. Sarcastic and like, yeah, sure, you got hurt, sure, you know. He didn't believe me, I guess.¹

¹ Claimant's Depo. at 8.

But Mr. Pittman testified and denied claimant advised him of an injury.² Mr. Pittman also testified that he did not observe claimant limping on the job site and that he was not aware that claimant was having any physical problems at that time. Furthermore, Mr. Pittman denied claimant told him he needed to clean up the job site before someone else was hurt.³

On October 15, 2002, claimant sought medical treatment for his right elbow. On that date, claimant saw a physician assistant who noted claimant was having left knee pain but there was no known injury. In early December 2002, claimant underwent an MRI that indicated he had a torn medial meniscus. According to claimant, this was not the first time that he had experienced left knee symptoms as he had sought medical treatment for his knee in either March or April 2002.

Sometime after October 2002, claimant allegedly told another supervisor, Jim Wilson, he had hurt his left knee at work. But the record is not clear when that conversation occurred.

The Board concludes that the evidence fails to establish that claimant provided respondent with timely notice of the alleged accident. The alleged conversation that claimant had with Mr. Pittman on the date of the alleged incident was not sufficient to place a reasonable person on notice that claimant had injured himself at work or that he had sustained a work-related accident. Further, the alleged conversation that claimant had with Jim Wilson occurred more than 10 days after the alleged accident.

The Workers Compensation Act requires an injured worker to provide the employer with notice of an accidental injury within 10 days of the accident. But if there is just cause for failing to provide notice within that period, the notice period is extended to 75 days.⁴ Claimant, however, is not alleging there is cause to extend the notice period.

Judge Foerschler denied claimant's request for workers compensation benefits. At this juncture, the Board concludes there is no reason to disturb the Judge's decision. Accordingly, the August 27, 2003 Decision should be affirmed.

WHEREFORE, the Board affirms the August 27, 2003 Preliminary Decision entered by Judge Foerschler.

² Pittman Depo. at 4.

³ *Id.* at 5.

⁴ K.S.A. 44-520.

IT IS SO ORDERED.

Dated this ____ day of November 2003.

BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Fund
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director